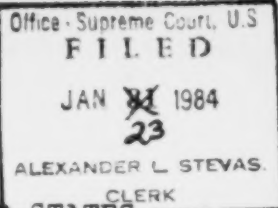


83 - 1269

CASE NO. \_\_\_\_\_



THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

IN RE: JOSE M. FERNANDEZ, CARLOS  
LAHERA, RAFAEL ENRIQUE FRANJUL  
AND LAZARA RODRIGUEZ

Petitioners

ON EMERGENCY PETITION FOR WRIT OF  
MANDAMUS TO THE UNITED STATES  
COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT

PETITION

BIERMAN, SONNETT, BEILEY,  
SHOHAT & SALE, P.A.  
EDWARD R. SHOHAT, ESQUIRE  
200 S.E. First Street, #500  
Miami, Florida 33131  
(305) 358-7477

and

JOHN LAZARUS, ESQUIRE  
9300 S.W. 61 Court  
Miami, Florida 33156

Attorneys for Petitioner

## QUESTIONS PRESENTED

Does the United States Court of Appeals for the Eleventh Circuit violate Rule 9 of the Federal Rules of Appellate Procedure when it accepts jurisdiction over a government appeal of an order imposing conditions of pre-trial release and then imposes a briefing and oral argument schedule which sets oral argument for a time approximately two months after the filing by the government of a notice of appeal, during which time the Petitioners remain incarcerated?

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PETITION FOR WRIT OF MANDAMUS TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

Petitioners, JOSE M. FERNANDEZ,  
CARLOS LAHERA, RAFAEL ENRIQUE FRANJUL and  
LAZARA RODRIGUEZ, respectfully request this  
Honorable Court to issue its most gracious  
writ of mandamus and state:

1. This is an action pursuant to  
Title 28 U.S.C. §1651, the All Writs Act.

2. Petitioners are Defendants in  
Case No. 83-993-Cr-ALH in the United States  
District Court, Southern District of Florida.

3. Respondents are the United  
States Court of Appeals for the Eleventh  
Circuit and Judges James C. Hill, Albert J.  
Henderson, Jr. and Frank M. Johnson of that  
Court making up the panel in Case No. 83-  
5839.

4. Petitioners were arrested and  
have been incarcerated since November 20,  
1983.

5. Following their arrests, Petitioners invoked their right to bail under the Eighth Amendment to the United States Constitution and sought proceedings pursuant to 18 U.S.C. §3146, the Bail Reform Act. On December 21, 1983, a hearing was conducted before the Honorable Alcee Hastings, United States District Judge, regarding Petitioners' bail status.

6. On December 22, 1983, Judge Hastings entered an Order reducing bond for the Petitioners LAHARA and RODRIGUEZ and initially setting bond for the Petitioners FERNANDEZ and FRANJUL.

7. On December 27, 1983, the United States of America (hereinafter the "government") filed a Notice of Appeal of the District Court Order. A copy of the government's Notice of Appeal is attached hereto as Exhibit "A".

8. The government also requested

the Court of Appeals to enter an emergency stay of Judge Hastings' bail Order. On December 28, 1983, the Respondent Eleventh Circuit Court of Appeals granted an indefinite stay of the District Court's Order for all Petitioners without either a hearing or argument and granted the government's motion to expedite the appeal. A copy of the Respondent's Order is attached hereto as Exhibit "B".

9. On December 29, 1983, the Respondent Court of Appeals set a briefing schedule allowing twenty days for appellant's and appellees' briefs and seven days for appellant's reply brief. The Court scheduled oral argument for the week of February 27, 1984. A copy of the Court's procedural Order is attached hereto as Exhibit "C".

10. On January 3, 1984, Petitioner, CARLOS LAHARA, filed his cross-appeal of the District Court's Order pursuant

to 18 U.S.C. §3147. LAHARA's cross-appeal challenges the District Court's determination of the amount of his bond. A copy of the Petitioner LAHARA's Notice of Appeal is attached hereto as Exhibit "D". On December 29, 1983, Petitioners filed motions to dismiss the government's appeal and a motion to dissolve the stay entered by the Respondent contending that the Respondent lacks jurisdiction over an appeal by the government from an order setting conditions of release pursuant to 18 U.S.C. §3146. This jurisdictional question is one of the main issues on the appeal.

11. On January 5, 1984, Petitioners filed an Emergency Motion For Ruling on their Motion to Dismiss and Motion to Dissolve Stay and a Motion to Accelerate Consideration of the Appeal. A copy of these motions is attached hereto and incorporated herein as Exhibit "E".



12. On January 9, 1984, Petitioners Motion to Dismiss and Motion to Dissolve Stay were denied by the Respondent Court of Appeals without having either received a response from the government or heard oral argument. No formal ruling was had with respect to the Petitioners' Motion to Accelerate the Appeal. However, on January 18, 1984, Petitioners received formal notification from the Court of Appeals that oral argument is scheduled for Monday, February 27, 1984.

13. The current hearing and determination schedule established by the Respondent Court of Appeals violates Petitioners' fundamental right to bail under the Eighth Amendment to the United States Constitution and 18 U.S.C. §3146. Were this an appeal by the Petitioners from a pre-trial order setting bail pursuant to 18 U.S.C. §3147(b) - the only appeal authorized by law

from a pre-trial order setting bail - that Section requires that "the appeal shall be determined promptly."

14. The present briefing and argument schedule established by the Respondent Court of Appeals is in direct violation of Rule 9 of the Federal Rules of Appellate Procedure, which provides:

Rule 9. Release in Criminal Cases.

(a) Appeals from orders respecting release entered prior to judgment of conviction. An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the District Court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the records as the parties shall present. The Court of Appeals or a judge thereof may order the release of the appellant pending the

appeal.

Although Petitioners have argued below that the language of Rule 9 is evidence of the fact that the government may not appeal a pre-trial order setting bail, it is clear that if such an appeal exists it must be determined "promptly" without the delays attendant to the preparation and filing of briefs and other papers. Petitioners advise this Court that the government's preliminary appellate papers included a complete record of the proceedings in the District Court; the Court of Appeals has before it at this time all papers necessary on which to decide the appeal.

15. The Petitioners have no adequate remedy at law nor in any other court to require the Respondent Court of Appeals to establish a prompt hearing and determination date on the government's appeal. The Respondent Court of Appeals has heretofore

rejected all requests for a prompt ruling on the bond question.

16. Petitioners are suffering irreparable injury as they remain preventatively detained after a District Court judge has determined the appropriate amount of bail to assure their reasonable appearance. Petitioners will have no redress for the time that they have been incarcerated if, after a hearing, they are released on bond. Moreover, the day on which oral argument has been scheduled by the Respondent Court of Appeals is subsequent to the scheduled trial date, thereby effectively rendering moot Petitioners' constitutional right to pre-trial bail.

17. This Court has consistently held "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545,

552, 85 S.Ct. 1187, 1191 (1965); Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 902 (1976).

18. In Atkins v. Michigan, 644 F.2d 543, 550 (6th Cir. 1981), the Sixth Circuit stated, "[t]he due process questions ... exist here only in connection with the right to bail pending trial - a right that must be defended immediately if it is to be protected at all."

19. Your Petitioners herein seek only a prompt hearing as required by the same law available to them if they had been the appealing parties. To accomplish this purpose, Petitioners respectfully request that this Court immediately, and without requiring a response from the government or the Respondent, order the Respondent, United States Court of Appeals, to schedule an immediate hearing on and to determine the government's appeal in Case No. 83-5834.

Respectfully submitted,

BIERMAN, SONNETT, BEILEY,  
SHOHAT & SALE, P.A.  
EDWARD R. SHOHAT, ESQUIRE  
200 S.E. First Street  
Suite 500  
Miami, Florida 33131  
(305) 358-7477  
and  
JOHN LAZARUS, ESQUIRE  
9300 S.W. 61 Court  
Miami, Florida 33156

Attorneys for Petitioners

By: EDWARD R. SHOHAT  
EDWARD R. SHOHAT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and  
correct copy of the foregoing was mailed  
this 20<sup>th</sup> day of January, 1984, to JON MAY,  
Assistant United States Attorney, 155 South  
Miami Avenue, Miami, Florida, 33130-1693, and  
to all counsel of record.

By: EDWARD R. SHOHAT  
EDWARD R. SHOHAT

A P P E N D I X

EXHIBIT "A"

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

NO. 83-993-Cr-ALH

UNITED STATES OF AMERICA

v.

JOSE MANUEL FERNANDEZ-TOLEDO,  
a/k/a Jose M. Fernandez,  
a/k/a Cheo Fernandez,  
LAZARA ESTHER RODRIGUEZ-SENSAT,  
a/k/a Lazara Rodriguez,  
a/k/a Linda,  
CARLOS SANTIAGO LAHERA-GONZALEZ,  
a/k/a Carlos Lahera,  
RAFAEL ENRIQUE FRANJUL,  
a/k/a Frank Sinatra,  
a/k/a Frankie

---

NOTICE OF APPEAL

Notice is hereby given that the United States of America, pursuant to Title 28,, United States Code, Section 1291, and Title 18, United States Code, Section 3731, appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the Honorable Alcee L. Hastings, United States District Judge for the Southern



District of Florida, entered in the above-styled cause on December 22, 1983, setting bond as to defendants Fernandez and Franjul and reducing bond as to defendants Lahera and Rodriguez.

Respectfully submitted,

STANLEY MARCUS  
UNITED STATES ATTORNEY

BY:

JON MAY  
Assistant United States Attorney  
155 South Miami Avenue  
Miami, Florida 33130-1693  
Telephone: (305) 350-5414

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal was this 27th of December, 1983, mailed to: FEDERICO A. MORENO, ESQ., 19 West Flagler Street, Suite 714, Miami, Florida 33130; EDWARD R. SHOHAT, ESQ., 200 S.E. First Street, #500, Miami, Florida 33131; JOHN LAZARUS, ESQ. 9300 S.W. 61st Court, Miami, Florida 33156; and OSCAR RODRIGUEZ, ESQ., 300

Seville, Suite 313, Coral Gables, Florida  
33134.

---

JON MAY  
Assistant United States Attorney

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

NO. 83-5834

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JOSE MANUEL FERNANDEZ-TOLEDO,  
ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District  
Court for the Southern District of Florida

Before HILL, JOHNSON and HENDERSON, Circuit  
Judges.

B Y T H E C O U R T:

IT IS ORDERED that appellant's  
emergency motion for stay is granted.

IT IS FURTHER ORDERED that  
appellant's motion to expedite the appeal is  
granted.

EXHIBIT "C"

UNITED STATES COURT OF APPEALS  
Eleventh Circuit

December 29, 1983

TO ALL COUNSEL OF RECORD LISTED BELOW

Re: 83-5834 U.S.A. v. JOSE MANUEL  
FERNANDEZ-TOLEDO, LAZARA ESTHER  
RODRIGUEZ-SENSAT, CARLOS SANTIAGO  
LAHERA-GONZALEZ, & RAFAEL ENRIQUE  
FRANJUL

Dear Counsel:

Enclosed is a copy of this Court's  
order granting the government's motion to  
stay and expedite the appeal.

In light of the court having  
expedited this appeal, the following briefing  
schedule should be strictly adhered to:

Appellant's brief is due for  
filing within 20 days from the  
date of this letter or no later  
than January 18, 1984;

Appellees' briefs are due for  
filing within 20 days from  
service of appellant's brief.

Any reply brief by the appellant  
should be filed within seven (7)  
days from service of appellees'  
briefs.

This case will be argued in Miami,

Florida, during the week of February 27, 1984. You will receive the exact date of oral argument at a later date.

By copy of this letter to the clerk, Southern District of Florida, and the court reporter, we are requesting the record on appeal be filed expeditiously.

Sincerely,

SPENCER D. MERCER, CLERK

By: Warren A. Godfrey, Chief  
Judicial Support Division

WAG/sh

Enclosure

Linda Collins Hertz, AUSA-Miami

John May, AUSA-Miami

Federico A. Moreno

Edward R. Shohat

John Lazarus

Oscar Rodriguez

Robert March, Clerk, SFL

Helen Norton-Powell

EXHIBIT "D"

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

NO. 83-993-Cr-ALH

UNITED STATES OF AMERICA

v.

CARLOS SANTIAGO LAHERA-GONZALEZ

---

NOTICE OF APPEAL FROM CONDITIONS OF RELEASE

Notice is hereby given that  
Defendant, Carlos Lahera, pursuant to Title  
18 U.S.C. Section 3147(b), appeals to the  
United States Court of Appeals for the  
Eleventh Circuit from the Order of the  
Honorable Alcee L. Hastings, United States  
District Judge for the Southern District of  
Florida, entered in the above-styled cause on  
December 22, 1983, as to the amount of bond

set for Defendant Lahera.

Respectfully submitted,

JOHN D. LAZARUS  
Attorney for Carlos Lahera  
9300 S. W. 61st Court  
Miami, FL 33156  
(305) 667-7192

EXHIBIT "E"

IN THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO.: 83-5834

UNITED STATES OF AMERICA,	:
	:
Appellant/Plaintiff,	:
	:
v.	:
	:
JOSE MANUEL FERNANDEZ-TOLEDO,	:
et al.,	:
	:
Appellees/Defendants.	:
	:

---

EMERGENCY MOTION: (1) FOR RULING ON  
MOTION TO DISMISS AND MOTION TO DISSOLVE  
STAY; AND (2) TO ACCELERATE CONSIDERATION  
OF APPEAL

The Defendant/Appellee, JOSE MANUEL  
FERNANDEZ-TOLEDO, (hereinafter "Defendant"),  
by and through his undersigned counsel,  
respectfully moves this Honorable Court: (1)  
to rule on his previously filed Motion to  
Dismiss Appeal and Motion to Dissolve Stay;  
and (2) to accelerate consideration of  
appeal. In support of this motion, the  
Defendant would show:



1. This case is an appeal by the United States of America (hereinafter "government") from an Order of the Honorable Alcee L. Hastings, United States District Judge, dated December 22, 1983, setting conditions of pre-trial release pursuant to Title 18 U.S.C. §3146. The government's Notice of Appeal was filed on December 27, 1983.

2. Prior to filing its Notice of Appeal, the government, on December 23, 1983, prefiled an Emergency Motion for Stay and Motion to Expedite the Appeal together with a package of nine (9) exhibits.

3. On December 28, 1983, one day after the government filed its Notice of Appeal, this Court granted the government's Emergency Motion for Stay and Motion to Expedite the Appeal.

4. On December 29, 1983, the Defendant filed his Memorandum of Points and

Authorities in Reply to Emergency Motion for Stay and Motion to Dismiss the Appeal as well as a Motion to Dissolve the Stay and for Immediate Release During the Pendency of the Appeal.

5. That same day the Court, by letter, established a briefing and oral argument schedule by which this case will not be ripe for determination until after oral argument which is scheduled for the week of February 27, 1984.

6. The trial of this case is currently scheduled to commence on February 1, 1984. Therefore, the briefing and oral argument schedule, as currently set, could result in a de facto reversal of the District Court having the practical effect of keeping the Defendant in custody during all of the pre-trial period in this case.

7. The current briefing and oral argument schedule constitutes a denial of the

Defendant's right to bail under the Eighth Amendment to the United States Constitution and under the Bail Reform Act, Title 18 U.S.C. §3146.

8. The present briefing and oral argument schedule is unnecessary to a proper determination of this appeal. The issues have been thoroughly briefed by the parties in the form of the government's Emergency Motion for Stay and the Defendant's response thereto. The nine (9) exhibits submitted by the government along with its Emergency Motion for Stay make up the entire relevant record below. The government's exhibits include transcripts of all the proceedings except the proceeding before Judge Hastings which consisted purely of the argument of counsel. Although he had the record of all proceedings before the Magistrate before him, no testimony was taken before Judge Hastings.

9. This Court considered and

granted the government's Motion for Stay of the Defendant's release in one day without so much as a hearing or an opportunity for Defendant to respond. On the other hand, neither the Defendant's Motion to Dismiss nor his Motion to Dissolve Stay have been ruled upon to the knowledge of counsel. This situation is manifestly unfair especially in light of the fact that the central issue in this case is the Defendant's right to bail.

WHEREFORE, the Defendant, JOSE MANUEL FERNANDEZ-TOLEDO, respectfully prays this Honorable Court to immediately rule upon his Motions to Dismiss and Motion to Dissolve Stay and otherwise to advance the oral argument date in this case to the next next available date and thereafter to make an immediate determination on the merits of this

appeal.

Respectfully submitted,

BIERMAN, SONNETT, BEILEY,  
SHOHAT & SALE, P.A.  
Attorneys for Appellee  
200 S.E. First Street, #500  
Miami, Florida 33131

BY \_\_\_\_\_  
EDWARD R. SHOHAT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and  
correct copy of the foregoing was delivered  
by \_\_\_\_\_ this \_\_\_\_\_ day of January 1984 to JOHN  
MAY, ESQ., Assistant United States Attorney,  
155 South Miami Avenue, Miami, Florida  
33130-1693 and to all counsel of record.

BY \_\_\_\_\_  
EDWARD R. SHOHAT